Supreme Court, U.S.
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No. 01-316

In The

Supreme Court of the United States

JOSEPH PAYNE,

Petitioner,

v.

MILWAUKEE COUNTY, MILWAUKEE COUNTY PERSONNEL REVIEW BOARD, and JEFFREY M. JENTZEN, M.D.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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STATEMENT OF FACTS

The trial court issued a post-verdict decision on November 24, 2000. This decision concerned substantive issues as appropriate after the jury's verdict. The court denied the plaintiff's motion for remedial orders and for a new trial as to questions 3 and 4 of the verdict.

The trial court issued a second post-verdict decision on February 26, 2001. This decision dealt only with Title 42 U.S.C. §1988 attorney fees requests from three separate attorneys on behalf of the plaintiff and Rule 68 Federal Rules of Civil Procedure costs on behalf of the defendants.

Both of these decisions were the subject of an appeal filed on March 22, 2001.

REASONS FOR DENYING THE WRIT

A. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI

Rule 10 of the Supreme Court Rules governs a review by writ of certiorari. This is not an appeal as a matter of right, but of judicial discretion. Subsection (a) to Rule 10 governs this case and reads as follows:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual

> course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; . . .

The petitioner has made no effort in his filing to comply with this mandate. The petitioner has made no effort to explain how his situation falls under this Rule. The petitioner does not mention, cite or even allude to this Rule.

The reason for this omission is obvious. The petitioner simply failed to perfect a timely appeal of the order entered on November 26, 2000. Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal in a civil case be filed in the district court within 30 days of the entry of the judgment or order appealed. The appeal of this order was not made until March 22, 2001 which is far beyond the 30 days. The district court had not granted an extension of the appeal period and the Court of Appeals was not empowered to do so, see, Federal Rule of Appellate Procedure 26(b).

The fact of failing to perfect a timely appeal of a court's order or judgment probably happens every day in the practice of law in the United States. This would hardly seem to qualify for this court to exercise its discretionary supervisory powers as outlined in Rule 10(a) Supreme Court Rules.

This petition should be denied on the ground that the petitioner has failed to establish any entitlement to relief pursuant to Rule 10(a) Supreme Court Rules.

B. THE LAW IS CLEAR THAT UNRESOLVED ISSUES CONCERNING FEES AND COSTS HAVE NO EFFECT ON THE FINALITY OF THE JUDGMENT ON THE MERITS

This case was one to vindicate the Petitioner's First Amendment Rights and was prosecuted under Title 42 U.S.C. §1983 (civil rights actions). The issues as they relate to these substantive rights, the jury trial and post-verdict motions were all dealt with in the decision of the trial court issued on November 26, 2000, and entered on November 27, 2000.

But since this was a civil rights case in which the petitioner was the prevailing party he was also entitled to file attorneys fees petitions with the Court pursuant to Title 42 U.S.C. §1988. The Court denied these fee petition requests on February 26, 2001.

It has been clearly established that a claim for attorney fees under Title 42 U.S.C. §1988 raises legal issues collateral to the main cause of action. *White v. New Hampshire Department of Employment Security,* 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982). The finality of a district court's order disposing of the merits of a case is appealable, separate and apart from the attorney's fees authorized by a separate statute. *Halderman v. Pennhurst School & Hospital,* 673 F.2d 628 (CA3, 1992). The appeal was simply not timely as to the district court decision entered on November 24, 2000 which finalized the case on its merits. *Beckwith Machinery Company v. Travelers Indemnity Company,* 815 F.2d 286 (CA3, 1987).

The Petitioner denied to himself the opportunity to appeal all issues because of his neglect in filing a timely appeal. The Court of Appeals had nothing to do with it.

CONCLUSION

The Petitioner has failed to argue, much less establish, that he is entitled to relief under the discretionary jurisdiction of the Supreme Court pursuant to Rule 10(a) Supreme Court Rules. The Petitioner simply failed to perfect an appellate filing deadline on an appeal from a civil rights judgment or order. The collateral nature of attorney fees requests is clear and unambiguous and there is no conflict between Districts or Circuits.

This petition must be denied.

Dated at Milwaukee, Wisconsin this 19th day of September, 2001.

Respectfully submitted,

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